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# The Uniform Probate Code and the Veterans' Administration

OF *William F. Fratcher*

*In most states the existing legislation covering the guardianship of minors and mental incompetents who have some connection with the Veterans' Administration — the Uniform Veterans' Guardianship Act — is a classic example of "legislative overkill." Through three hypotheticals, Professor Fratcher illustrates the operation of the Uniform Veterans' Guardianship Act and demonstrates that literal application of existing state laws can lead to surprising and absurd results. After discussing the background of the Uniform Veterans' Guardianship Act, Professor Fratcher describes Article V of the Uniform Probate Code and analyzes its effect in replacing the Uniform Veterans' Guardianship Act. He then discusses and criticizes amendments to Article V proposed by the Veterans' Administration. Professor Fratcher concludes that with or without them, Article V is unquestionably preferable to the Uniform Veterans' Guardianship Act as a solution to present problems of state schemes.*

**L**IKE NUCLEAR OVERKILL, legislative overkill can be costly and wasteful. Most states now suffer from legislative overkill in the guardianship of minors and mental incompetents who have some more or less remote connection with the Veterans' Administration. Replacement of the existing legislation in this field with the Uniform Probate Code would eliminate the unnecessary statutory overlap and confusion that exist in virtually every state.<sup>1</sup> The need for the sort of solution provided by the Code is well demonstrated by the extent of the existing evil, which can best be comprehended through a series of examples.

## I. EXTENT OF THE EXISTING EVIL

### *Example 1. The Bates Farm*

At the turn of the century Aaron Bates used to sit in his rocking chair beside the coal stove and recount, for the edification of his

<sup>1</sup> To date, only two states have elected to take this course: Alaska, ALASKA STAT. §§ 13.06.005 to 13.36.100 (1972); and Idaho, IDAHO CODE ANN. §§ 15-5-101 to -307 (Supp. 1971). See note 160 *infra*.

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granddaughter, Alice Bates, his adventures as a cavalryman in the Civil War and as a farmer thereafter. Before age and illness clouded her memory, Alice could remember vividly the old man's frequently repeated account of how he bought the 160-acre Bates Farm with "\$194 earned with these-here hands and my first six-dollar pension check from the government."<sup>2</sup>

In 1916 Alice married Charles Dent, who served in the Army in France in 1917 and 1918. He returned home without injury but was run over and killed in 1925 by a Model T Ford which he was cranking. Alice collected the \$1,000 due on Charles' United States Government Life Insurance policy<sup>3</sup> and soon spent the money. In 1927 she married Edward Fox. Fox worked the Bates Farm as lessee of Alice's father from 1925 until 1950, when her father died and Alice inherited the farm. Alice and Edward Fox continued to live on the Bates Farm until 1971. Beginning in 1969, however, Alice became progressively more bewildered and forgetful, so that she could not manage the household, and Edward gradually became too feeble to work the farm. The old couple sadly decided to sell the Bates Farm and move to a retirement home in town.

Midcontinent Hograisers, Inc., offered the excellent price of \$40,000 for the Bates Farm but insisted, in view of Alice's deteriorated mental condition, that the conveyance be made by a guardian of her estate under court order. Accordingly, proceedings for appointment of a guardian of Alice's estate and for authority for the guardian to sell and convey the Bates Farm were instituted under the general guardianship law, with notice to Alice and all other notices prescribed by that law. Edward Fox was appointed guardian and authorized to sell and convey the Bates Farm to Midcontinent Hograisers, Inc., which he did on July 1, 1971. The proceeds of the sale were used to pay for Alice's debts and for her lifetime care.

Edward Fox died in December 1971. Alice Fox died intestate in June 1972, leaving her second cousin, Absalom Bates, as her sole heir at law. On July 1, 1972, Absalom Bates commenced an action of ejectment for the Bates Farm against Midcontinent Hograisers, Inc. The defendant had paid a full and adequate price for the farm in good faith, without knowledge of any fact indicating that the

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<sup>2</sup> Act of June 27, 1890, ch. 634, § 2, 26 Stat. 182. Pensions granted under this Act were paid by the Commissioner of Pensions, a predecessor of the present Administrator of Veterans' Affairs.

<sup>3</sup> Act of June 7, 1924, ch. 320, § 301, 43 Stat. 607. Policies issued under this Act in exchange for World War I war risk insurance were payable by the United States Veterans' Bureau, a predecessor of the present Veterans' Administration.

Veterans' Administration had an interest in the guardianship proceeding. Yet in any of the 29 states<sup>4</sup> which have adopted the 1942 version of the Uniform Veterans' Guardianship Act,<sup>5</sup> the plaintiff, Absalom Bates, probably would win the ejectment action because section 2 of that Act provides:

The Administrator [of Veterans' Affairs] shall be a party in interest . . . in any suit or other proceeding affecting in any manner the administration by the guardian of the estate of any present or former ward whose estate includes assets derived in whole or in part from benefits heretofore or hereafter paid by the Veterans' Administration [its predecessors or successors]. Not less than 15 days prior to hearing in such matter notice in writing of the time and place thereof shall be given by mail (unless waived in writing) to the office of the Veterans' Administration having jurisdiction over the area in which any such suit or any such proceeding is pending.<sup>6</sup>

In the Uniform Veterans' Guardianship Act "benefits" means "all moneys paid or payable by the United States through the Veterans' Administration," its predecessors or successors.<sup>7</sup> Hence the six dollars of pension money paid to Aaron Bates in 1890 by the Commissioner of Pensions and the \$1,000 of life insurance proceeds paid to Alice Dent in 1925 by the United States Veterans' Bureau were benefits within the meaning of section 2. The Act defines "ward" as "a beneficiary of the Veterans' Administration," its predecessors or successors,<sup>8</sup> so Alice Fox was a "former ward" within the meaning of section 2 at the time of the 1971 guardianship proceeding even though she was not under guardianship when paid the insurance proceeds in 1925. Because her grandfather used six dollars of his Civil War pension money to pay for the farm in 1890, Alice's estate included "assets derived . . . in part from benefits heretofore . . . paid by" a predecessor of the Veterans' Administration. Therefore, section 2 required 15 days' notice to the Veter-

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<sup>4</sup> See, e.g., MO. ANN. STAT. § 475.385 (1956); OHIO REV. CODE ANN. § 5905.03 (Page 1954).

<sup>5</sup> 8 UNIFORM LAWS ANN. 641 (Master ed. 1972); 1970 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 388.

<sup>6</sup> UNIFORM VETERANS' GUARDIANSHIP ACT § 2 (1942 version) [hereinafter cited as U.V.G.A. (1942 version)]. There is some variation among the states as to the notice requirement: the Hawaii statute, for example, requires 14 days' notice to the Veterans' Administration, HAWAII REV. STAT. § 552-2 (1968); the Ohio statute requires only five days' notice, OHIO REV. CODE ANN. § 5905.03 (Page 1954).

<sup>7</sup> U.V.G.A. § 1 (1942 version); MO. ANN. STAT. § 475.380 (1956); OHIO REV. CODE ANN. § 5905.01 (Page 1954).

<sup>8</sup> *Id.*

ans' Administration of the hearing on the petition for appointment of a guardian for Alice's estate and the hearing on the petition for authorization of the sale of the farm. These notices were not given.

Because Alice Fox was not receiving payments from the Veterans' Administration at the time of the 1971 guardianship proceeding, the only interest that agency had in the proceeding was in protecting its inchoate right to escheat of assets derived from benefits payable under laws administered by the Veterans' Administration in the event a person under guardianship dies intestate without heirs.<sup>9</sup> The plaintiff in ejectment, Absalom Bates, however, is not claiming under or through the Veterans' Administration, but as Alice Fox's heir. Therefore, the mere fact that the guardianship proceedings may not have bound the Veterans' Administration would not help the plaintiff's case if the sale of Bates Farm by her guardian bound Alice Fox. The fact that a person who was, or should have been, a party to litigation was not served or notified may prevent him from being bound by a judgment in that litigation,<sup>10</sup> but it does not necessarily prevent those parties who were properly served or notified from being bound by a judgment of a superior court of general jurisdiction proceeding within the general scope of its common law or equity powers.<sup>11</sup>

There is, however, every indication that the court which appointed Edward Fox the guardian for Alice Fox was not a superior court of general jurisdiction proceeding within the general scope of its common law or equity powers and that, therefore, Absalom Bates was not bound by the guardianship proceedings or the subsequent sale of the Bates Farm to Midcontinent Hograisers, Inc. The English courts lacked the power to authorize the sale of land of a mentally incompetent adult until the enactment of the Act of 4 July

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<sup>9</sup> 38 U.S.C. § 3202(e) (1970). It is interesting to speculate whether, if Alice Fox had died intestate without heirs while under guardianship and owning the Bates Farm, the Veterans' Administration would have been entitled, under this section, on the basis of Aaron Bates' investment of six dollars of his Civil War pension in the farm in 1890, to: (1) the whole Bates Farm; (2) 6/200 of the Bates Farm; (3) a lien on the Bates Farm for six dollars; or (4) nothing. The mere fact that the benefits were paid to the veteran before the enactment of the federal escheat statute would not prevent escheat to the Veterans' Administration of assets purchased with those benefits. *In re Estate of Campbell*, 195 Misc. 520, 89 N.Y.S.2d 310 (Surr. Ct. 1949). *Cf. Estate of Walker*, 25 Cal. 2d 719, 154 P.2d 891 (1944), *cert. denied*, 325 U.S. 869 (1945). The application of the federal escheat statute to such property raises serious constitutional problems. *See Estate of Lindquist*, 25 Cal. 2d 697, 154 P.2d 879 (1944), *cert. denied*, 325 U.S. 869 (1945).

<sup>10</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1949); *Webster v. Reid*, 52 U.S. (11 How.) 437 (1850).

<sup>11</sup> *See Vattier v. Hinde*, 32 U.S. (7 Pet.) 252 (1833).

1803.<sup>12</sup> Hence a decree authorizing such sale has never been within the general scope of the common law or equity powers of the courts. The power to render such a decree is statutory.<sup>13</sup> In this country, moreover, statutes commonly confer this power on inferior courts of special and limited jurisdiction.<sup>14</sup> Because of these two peculiarities affecting jurisdiction over proceedings to authorize the sale of land of mental incompetents, the following passages from the opinion of Mr. Justice Field in *Galpin v. Page*<sup>15</sup> are pertinent:

It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers . . . is presumed to have jurisdiction to give the judgments it renders until the contrary appears . . . . The rule is different with respect to courts of special and limited authority; as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averment in the record, or their judgments will be deemed void on their face.

. . . .

The presumptions indulged in support of the judgments of superior courts of general jurisdiction are . . . limited to jurisdiction . . . over proceedings which are in accordance with the course of the common law.

. . . .

"A court of general jurisdiction . . . may have special and summary powers, wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases, its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject-matter of the judgment, and as to the persons affected by it, must appear by the record; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it."<sup>16</sup>

<sup>12</sup> *Ex parte Dikes*, 8 Ves. Jun. \* 79, 32 Eng. Rep. 282 (Ch. 1802); Act of July 4, 1803, 43 Geo. 3, c. 75.

<sup>13</sup> *Berry v. Rogers*, 41 Ky. 308 (1842); *Latham v. Wiswall*, 37 N.C. 294, 299 (1842); J. WOERNER, *AMERICAN LAW OF GUARDIANSHIP* § 148 (1897). Cf. *Dodge v. Cole*, 97 Ill. 338 (1881), *Ex parte Drayton*, 1 Desaussure 136 (S.C. 1786); *Ex parte Drayton*, 1 Desaussure 116 (S.C. 1785).

<sup>14</sup> E.g., MO. ANN. STAT. §§ 472.020, 475.200, 475.220-250 (1956); OHIO REV. CODE §§ 2101.24, 2127.05, 2127.10, 2127.13 (Page 1968).

<sup>15</sup> 85 U.S. (18 Wall.) 350 (1873).

<sup>16</sup> *Id.* at 365-66, 367, 371. The last paragraph is a quotation from the opinion in *Morse v. Presby*, 25 N.H. 299 (1852). In holding that a former ward could recover in ejectment land sold by his guardian under authorization of the county court, the New York Court of Appeals said:

It is elementary, that statutory provisions in derogation of the common law, by which the title of one is to be divested, and transferred to another, must be strictly pursued, and every requisite thereof having the semblance of benefit to its owner, must be complied with in order to divest his title. *Ellwood v. Northrup* 106 N.Y. 172, 185, 12 N.E. 590, 593 (1887).

Not only is there a presumption against the jurisdiction of a court of inferior and limited jurisdiction purporting to exercise powers wholly derived from statutes; but there is also a tendency to hold that any deviation from the procedures prescribed by statute deprives the court of jurisdiction, although a like irregularity in the proceedings of a superior court of general jurisdiction acting under its general powers would not be deemed to deprive the court of jurisdiction. If a statute requires that notice of the hearing on a petition for appointment of a guardian be given to someone other than the ward, the court lacks jurisdiction to make the appointment if the notice prescribed by statute is not given.<sup>17</sup> It is commonly held that if notice of the hearing on either the petition for appointment of the guardian or the petition for authority to sell is not given as prescribed by statute, a guardian's sale of the ward's land is void and the ward or his successor in interest may recover the land by an action of ejectment against the purchaser.<sup>18</sup> In such case, the purchaser may have no effective remedy for recovery of the price which

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<sup>17</sup> *Seaverns v. Gerke*, 21 F. Cas. 941 (No. 12,595) (C.C.D. Cal. 1875); *In re Eikerkotter's Estate*, 126 Cal. 54, 58 P. 370 (1899); *Edwards v. Lampkin*, 112 Ga. App. 128, 144 S.E.2d 119 (1965); *Devereaux v. Janes*, 141 Mich. 265, 104 N.W. 579 (1905); *In re Guardianship of Kelley*, 1 Ohio App. 2d 137, 204 N.E.2d 96 (1964) (*semble*); *Smith v. Page*, 117 Okla. 223, 246 P. 217 (1926); *Myers v. Harness*, 116 Okla. 268, 244 P. 1109 (1925). See *Davis v. Hudson*, 29 Minn. 27, 32-34, 11 N.W. 136, 138 (1881); *State ex rel. Kassen v. Carver*, 355 S.W.2d 324, 329-30 (Mo. App. 1962); *Erickson v. McCullough*, 91 Utah 159, 167-69, 63 P.2d 595, 599 (1937). Cf. *Hart v. Gray*, 11 F. Cas. 686 (No. 6,152) (C.C.D.R.I. 1838); *Arrington v. Arrington*, 32 Ark. 674 (1878); *Skelly v. The Maccabees*, 217 Mo. App. 333, 272 S.W. 1089 (1925); *Bobo v. Bell*, 171 Ohio St. 311, 170 N.E.2d 730 (1960); *Hawkins v. Tiger*, 163 Okla. 55, 20 P.2d 578 (1933); *Harness v. Myers*, 143 Okla. 147, 288 P. 285 (1930). Other cases are collected in *Annots.*, 92 A.L.R.2d 1336, 1338-40 (1963); 2 A.L.R.2d 6, 14, 187-97 (1948); 109 A.L.R. 338-45 (1937).

<sup>18</sup> *Seaverns v. Gerke*, 21 F. Cas. 941 (No. 12,595) (C.C.D. Cal. 1875); *Hobart v. Upton*, 12 F. Cas. 259 (No. 6,548) (C.C.D. Ore. 1872); *Molton v. Henderson*, 62 Ala. 426 (1878); *White v. White Co.*, 4 Alas. 317 (1911); *Palmer v. Oakley*, 2 Dougl. 433, 47 Am. Dec. 41 (Mich. 1847); *Bennett v. Hayden*, 145 Pa. 586, 23 A. 400 (1891). Cf. *Martin v. White*, 146 F. 461 (9th Cir. 1906); *McGee v. Hayes*, 127 Cal. 336, 59 P. 767 (1899); *Townsend v. Tipton*, 289 Ky. 766, 160 S.W.2d 161, 142 A.L.R. 306 (1942) (administrator's sale of land void as against minor heirs because notice of hearing required by statute not given to their mother); *Clapper v. Chandler*, 406 S.W.2d 114 (Mo. App. 1966), *discussed in* *Basye, Are Probate Courts in Missouri Undergoing Retrogression?*, 32 MO. L. REV. 175, 177-84 (1967) (administrator's sale of land void as against an heir who attended the sale, because notice of hearing prescribed by statute defective); *In re Guardianship of Reynolds*, 103 Ohio App. 102, 144 N.E.2d 501 (1956); *In re Koenigshoff*, 99 Ohio App. 39, 119 N.E.2d 652 (1954). But see *Dutcher v. Hill*, 29 Mo. 271 (1860); *In re Bireley's Guardianship*, 41 Ohio L. Abs. 604, 59 N.E.2d 71 (Ct. App. 1944); *Oldham v. Winger*, 47 Ohio App. 287, 191 N.E. 824 (1933); *Jordan v. Dickson*, 10 Ohio Dec. Reprint 332, 20 Ohio L.J. 360 (1888). Other cases are collected in *Annots.*, 138 A.L.R. 1364-69 (1942); 23 A.L.R. 594-609 (1923).

he paid to the guardian.<sup>19</sup> Thus, under section 2 of the Uniform Veterans' Guardianship Act requiring notice to be served upon the Veterans' Administration, Absalom Bates will probably succeed in his suit for ejectment against Midcontinent Hograisers, Inc.

*Example 2. The Harrison Ranch*

When George Harrison died in 1965 he devised most of his multi-million dollar estate, including the Harrison Ranch, to his daughter Gertrude, who had married Irwin Jones in 1941. Irwin Jones served as an officer in World War II. After the war he converted his term-plan \$10,000 National Service Life Insurance policy to the twenty-pay life plan and it became fully paid-up in 1962.<sup>20</sup> Irwin Jones filed forms with the Veterans' Administration designating his wife Gertrude as beneficiary of the policy and electing payment Option 3, under which Gertrude would be entitled to monthly payments throughout her life.<sup>21</sup>

Gertrude and Irwin Jones were riding in one of their Cadillacs along Highway 13 on an afternoon in July 1971, when they collided with a Dachshund bus, being driven on the wrong side of the road. Irwin Jones, the Jones' chauffeur, and the bus driver were killed. Gertrude Jones was taken to the hospital in a deep coma. Attending physicians were not sure that she would ever regain consciousness.

The day after the collision Kenneth Leach, manager of the Harrison Ranch, received word that Criterion Oil Company (Ohio) was about to drill for oil in the area and was willing to pay generously for a lease giving exclusive exploration and drilling rights in the Harrison Ranch. Leach knew that if wells were drilled beyond the borders of the Harrison Ranch, the oil under the ranch could be removed without compensation or profit to Mrs. Jones. He realized, therefore, that it was of great importance to negotiate a lease with the oil company while it was willing to take one. Accordingly, Kenneth Leach called at once on Martin Nelson, the Jones' lawyer, who was already busy preparing for the probate of Irwin Jones' will and the administration of his estate. Leach had no trouble in convincing Nelson that it was important to secure authority without delay for giving an oil lease binding the Harrison Ranch.

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<sup>19</sup> Reynolds v. McCurry, 100 Ill. 356 (1881); Bone v. Tyrrell, 113 Mo. 175, 20 S.W. 796 (1892). See also Douglas v. Bennett, 51 Miss. 680 (1875). Other cases are collected in Annot., 142 A.L.R. 310 (1943).

<sup>20</sup> Act of Oct. 8, 1940, ch. 757, § 602(f), 54 Stat. 10009.

<sup>21</sup> 38 U.S.C. § 717 (1970); 38 C.F.R. §§ 8.79-8.88 (1972).



Martin Nelson had Gertrude Jones' five children sign a petition for the appointment of a guardian of her estate on the ground that she was mentally incapacitated. The physicians attending Mrs. Jones at the hospital testified at length as to her incapacity and the court appointed Ashford National Bank guardian of Mrs. Jones' estate. The new guardian at once negotiated an oil lease to Criterion Oil Company (Ohio) on terms which were very advantageous to Mrs. Jones and petitioned the court for, and was granted, authority to execute the lease. Knowing of the National Service Life Insurance policy, Nelson took the extra precaution of securing written waivers of notice of hearing from the Veterans' Administration as to both the hearing on the petition for appointment of a guardian and the petition for authority to lease.<sup>22</sup> Late in July, Ashford National Bank, as guardian of the estate of Gertrude Jones, executed a lease giving exclusive oil exploration and drilling rights in the Harrison Ranch to Criterion Oil Company (Ohio).

Gertrude Jones emerged from coma in August 1971, and was discharged from the hospital in October. She spent the winter in the Caribbean and did not attempt to handle any business matters until her return to the Harrison Ranch in June 1972. Kenneth Leach, the ranch manager, was away attending the funeral of a member of his family when Mrs. Jones returned. On the day of her arrival a representative of the Criterion Oil Company (Missouri), a competitor of the Criterion Oil Company (Ohio), called at the ranch and presented Mrs. Jones with his company's handsome offer for an oil lease giving exclusive exploration and drilling rights in the Harrison Ranch. Unaware of the events of July 1971, Mrs. Jones executed the desired lease.

The two rival oil companies are now litigating their rights in the Harrison Ranch. It is probable that the lease given in July 1971, by Ashford National Bank, as guardian of the estate of Gertrude Jones, will be held void because the petition for appointment of the guardian did not comply with section 5 of the 1942 version of the Uniform Veterans' Guardianship Act, which provides: "(4) In the case of a mentally incompetent ward the petition shall show that such ward has been rated incompetent by the Veterans' Administration on examination in accordance with the laws and regulations governing the Veterans' Administration."<sup>23</sup>

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<sup>22</sup> U.V.G.A. § 2 (1942 version).

<sup>23</sup> *Id.* § 5 (1942 version). For examples of state enactments of this provision, see MO. ANN. STAT. § 475.400 (4) (1956); OHIO REV. STAT. ANN. § 5905.05 (Page 1954).

Because in July 1971 Gertrude Jones was entitled to money payable by the United States through the Veterans' Administration under her deceased husband's National Service Life Insurance policy, she was then a "present ward" of the Veterans' Administration.<sup>24</sup> Procedure under the Uniform Veterans' Guardianship Act would seem to be the exclusive method of securing the appointment of a guardian of the estate of a mental incompetent who is a present ward of the Veterans' Administration.<sup>25</sup>

There is, however, serious question as to whether Gertrude Jones was "mentally incompetent" within the meaning of the quoted provision of the Act. If she was, it is also questionable whether compliance was possible since the "laws and regulations governing the Veterans' Administration" appear to make no provision for mental examination or a rating as incompetent of a person who is merely a beneficiary of a National Service Life Insurance policy.<sup>26</sup>

Nevertheless, the language of the statute is mandatory. If it applies to a person in Mrs. Jones' situation, it would seem that the court did not acquire jurisdiction to appoint a guardian for her estate in the absence of an allegation in the petition for appointment that Mrs. Jones had been rated incompetent by the Veterans' Administration.<sup>27</sup> If the court lacked jurisdiction to appoint Ashford National Bank as guardian of the estate of Mrs. Jones, it probably also lacked jurisdiction to entertain and act upon the bank's petition for authority to grant the oil lease.<sup>28</sup> If this is so, the oil lease executed by the bank is a nullity even though the lessee may not have known facts sufficient to put it upon notice of the fact that Mrs. Jones had become by her husband's death a present ward of the Veterans' Administration.

### *Example 3. The Pennyworth Stock*

Orlando Palmer had just finished his second year in law school when he was drafted in 1943. After his discharge from the Army

<sup>24</sup> U.V.G.A. § 1 (1942 version).

<sup>25</sup> U.V.G.A. § 22 (1942 version); MO. ANN. STAT. §§ 475.015, 475.475 (1956). See *Krupp v. Franklin Sav. Bank*, 255 App. Div. 15, 5 N.Y.S.2d 365 (1938); *In re Parker*, 168 Tenn. 327, 330-31, 77 S.W.2d 816, 817 (1935). But see *DeWald v. Morris*, 397 S.W.2d 738 (Mo. App. 1965).

<sup>26</sup> See 38 C.F.R. §§ 3.353, 8.64, 17.45, 17.45a (1972).

<sup>27</sup> *Ball v. Safe Deposit and Trust Co.*, 92 Md. 503, 48 A. 155 (1901); *Brandee v. Beale*, 110 Neb. 686, 194 N.W. 787 (1923); *Providence County Sav. Bank v. Hughes*, 26 R.I. 73, 58 A. 254 (1904).

<sup>28</sup> *Hamilton v. Traber*, 78 Md. 26, 27 A. 229 (1893). See *O'Herron v. Gray*, 168 Mass. 573, 47 N.E. 429 (1897); *Myers v. McGavock*, 39 Neb. 843, 58 N.W. 522, 524 (1894).

in 1946, he completed law school under the so-called GI Bill of Rights.<sup>29</sup> Pursuant to this legislation the Veterans' Administration paid his third-year law school tuition and fees, a subsistence allowance, and the cost of necessary law books, including *Black's Law Dictionary* (3rd ed. 1933), *Atkinson on Wills* (1st ed. 1937), *Simes' Cases on Future Interests* (1st ed. 1939) and *Simes' Cases on Fiduciary Administration* (1st ed. 1941). Orlando Palmer married Quinta Ramsay in 1953 and their daughter, Quintilla, was born in 1954. Soon thereafter, Orlando Palmer paid a substantial sum to the Veterans' Administration for the conversion of his \$10,000 term policy of National Service Life Insurance to an ordinary life policy as of 1943.<sup>30</sup> At the same time he designated his wife as primary beneficiary and his daughter as contingent beneficiary and elected Option 3 (insurance payable in installments throughout life) for each of them.<sup>31</sup>

Orlando and Quinta Palmer were killed in an automobile collision in 1970. Her maternal uncle, Quintus Ramsay, was appointed guardian of the person and estate of Quintilla Palmer, a minor, after due notice to the Veterans' Administration and compliance with all other provisions of the Uniform Veterans' Guardianship Act.<sup>32</sup> The Veterans' Administration promptly commenced monthly payments of \$35.80 each under the National Service Life Insurance policy to the guardian. In 1971, upon completion of administration, the executor of Orlando Palmer's will distributed the entire net estate, valued at about \$150,000, including the four law books and a large sum in cash, to the guardian. The guardian then petitioned the court for authority to invest surplus funds, in compliance with section 13 of the Uniform Veterans' Guardianship Act. He provided the Veterans' Administration with a signed duplicate copy of the petition as required by that section and with 15 days' notice of the hearing, as required by section 10. After the hearing, the court authorized the guardian to invest most of the cash in a well-diversified portfolio of good bonds and stocks of corporations with established reputations and histories of regular dividend payments. Among the investments authorized by the court order was that of \$10,000 of money derived from the estate of Orlando Palmer, de-

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<sup>29</sup> Act of June 22, 1944, ch. 268, § 400(b), 58 Stat. 284, 287-89.

<sup>30</sup> 38 U.S.C. § 704 (1970) (originally enacted as Act of Feb. 21, 1947, ch. 5, § 2, 61 Stat. 5); 38 C.F.R. § 8.34 (1972).

<sup>31</sup> 38 U.S.C. § 717 (1970); 38 C.F.R. §§ 8.76, 8.77, 8.79, 8.91 (1972).

<sup>32</sup> U.V.G.A. §§ 2 (notice to VA), 5 (form of petition), 8 (notice to ward and VA), 9 (bond with qualified sureties) (1942 version).

ceased, in 100 shares of the common stock of the S. S. Pennyworth Company, a well-established corporation which operates a large and rapidly expanding chain of discount department stores.

The validity of such court order in some states is doubtful.<sup>33</sup> For example, the Ohio statute permits a fiduciary to invest up to 60 per cent of all of the property of the fund held by such fiduciary in corporate stock but the statute limits the authority conferred by it to "a fiduciary, including a guardian, other than a guardian under" the Uniform Veterans' Guardianship Act.<sup>34</sup> A comment on this statutory section states that "[a] guardian appointed under the Veterans' Guardianship Law may not invest moneys received from the Veterans' Administration under" this section.<sup>35</sup> If this comment is correct, the court order would be valid in Ohio because it did not relate to moneys received from the Veterans' Administration. The correctness of the comment is questionable, however, because in Ohio, as in most other states in which the problem can arise, it is not clear from the statutory language whether the restrictions of the Uniform Veterans' Guardianship Act affect the administration of property not derived, wholly or in part, from benefits paid by the Veterans' Administration when the ward also owns property so derived.<sup>36</sup> Quintilla Palmer does own four law books derived from benefits paid by the Veterans' Administration.

Quintus Ramsay is a university professor. During the latter part of May and early June 1972, the interval between the end of the spring semester and the beginning of the summer session, he and Mrs. Ramsay took their children and his ward, Quintilla Palmer, on a three-week vacation trip to Rocky Mountain National Park. When the Ramsays returned from this trip on Sunday, June 11, Quintus Ramsay found among his accumulated mail a letter from the S. S. Pennyworth Company, dated May 19, 1972, enclosing a warrant expiring June 15, 1972, for enforcement of the preemptive rights of Quintilla Palmer, as owner of 100 shares of stock, to purchase 100

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<sup>33</sup> On the other hand, the court order would clearly be valid in Missouri, for example, where the court has express statutory power to authorize a guardian, including one subject to the Uniform Veterans' Guardianship Act, to invest in "[a]ny property, real or personal, which the court finds, after hearing, is a reasonable and prudent investment in the circumstances." MO. ANN. STAT. § 475.190 (Supp. 1973), § 475.440 (1956). It is well settled that corporate stock may be a reasonable and prudent investment. *Rand v. McKittrick*, 346 Mo. 466, 142 S.W.2d 29 (1940); *St. Louis Union Trust Co. v. Toberman*, 235 Mo. App. 559, 140 S.W.2d 68 (1940).

<sup>34</sup> OHIO REV. CODE ANN. § 2109.371 (Page Supp. 1971).

<sup>35</sup> *Id.* § 2109.371, Comment (Page 1968).

<sup>36</sup> See note 25 *supra* & accompanying text.

shares of a new issue at \$100 per share. On Monday, June 12, 1972, Quintus Ramsay found through inquiry that Pennyworth stock was selling at \$120 per share and that the prospects of the company were considered excellent. At that time, the guardianship bank account had a balance of \$11,000, derived partly from payments made by the Veterans' Administration and partly from the income of securities purchased pursuant to the 1971 court order. Quintus Ramsey sent the warrant to the S. S. Pennyworth Company, endorsed with an election to purchase the full 100 shares at \$100 each, and accompanied by a check drawn on the guardianship bank account for \$10,000. These papers reached the S. S. Pennyworth Company on June 14, 1972, the same day upon which a petition was filed in the guardianship proceeding for approval of the stock purchase. A copy of the petition was delivered to the Veterans' Administration, together with a notice that the hearing on the petition would be held on June 30, 1972, in compliance with sections 2, 10, and 13 of the Uniform Veterans' Guardianship Act.

The S. S. Pennyworth Company refused to honor the election to purchase 100 shares of stock made on the warrant issued to Quintilla Palmer by her guardian, Quintus Ramsay. The reasons given by the company for its refusal were: (1) The terms of the warrant required the purchase to be on or before June 15, 1972; (2) section 13 of the Uniform Veterans' Guardianship Act permits a guardian to invest in other than federal and state obligations "only upon prior order of the court;" (3) a corporation which sells stock to a guardian or registers a transfer of stock to him with knowledge that he lacks power to invest his ward's funds in that stock commits an illegal act and incurs liability to the ward for any decline in the value of the stock;<sup>37</sup> and (4) under a statutory provision such as section 13, a court order entered after the stock purchase, purporting to ratify and approve it, would be a nullity which would not make the

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<sup>37</sup> *Humphries v. Manhattan Sav. Bank & Trust Co.*, 174 Tenn. 17, 122 S.W.2d 446 (1938); *Freeman v. Citizens' Nat'l Bank*, 167 Tenn. 399, 70 S.W.2d 25 (1934). See *Sontag v. Stix*, 355 Mo. 972, 199 S.W.2d 371, noted in 33 VA. L. REV. 652 (1947); *Grigsby v. First Nat'l Bank*, 136 Tex. 54, 144 S.W.2d 244 (1940). Cf. *King v. Richardson*, 136 F.2d 849 (4th Cir.), cert. denied, 320 U.S. 77 (1943); *Leake v. Watson*, 58 Conn. 332, 20 A. 343 (1890). Legislation recently enacted in many states would relieve such a corporation from the duty of inquiring into the guardian's powers of investment but would not relieve it from liability if it acted with knowledge that the guardian lacked power to enter into the transaction. UNIFORM COMMERCIAL CODE §§ 8-304, 8-318, 8-401 to -403; UNIFORM ACT FOR SIMPLIFICATION OF FIDUCIARY SECURITY TRANSFERS §§ 3, 7; UNIFORM FIDUCIARIES ACT § 3; MO. ANN. STAT. §§ 400.8-401 to -403 (1965), §§ 403.270, 403.310 (Supp. 1973); OHIO REV. CODE ANN. §§ 1308.31-1308.33 (Page 1962), § 2109.29 (Page 1968).

purchase legal or protect the corporation against liability to the ward.<sup>38</sup>

It is highly probable that, because of section 13 of the Uniform Veterans' Guardianship Act, the S. S. Pennyworth Company cannot be compelled to honor its warrant. Hence, solely because she is receiving installments of \$35.80 per month on the proceeds of life insurance for which her father paid the full premiums from his own income,<sup>39</sup> Quintilla Palmer, who has assets worth \$150,000, cannot take advantage of an opportunity to purchase an excellent investment with an immediate profit of \$2,000.

## II. THE BACKGROUND OF THE UNIFORM VETERANS' GUARDIANSHIP ACT

World War I resulted in a great increase in the number of persons entitled to federal hospitalization or money payments because of death or disability incurred by them, or some person upon whom they had been dependent, in military service. Many mentally incompetent veterans and minor children of deceased veterans were entitled to disability or death compensation. The United States Veterans' Bureau, created in 1921,<sup>40</sup> had difficulties with state court appointed guardians of these beneficiaries, since many such guardians were incompetent, dishonest, and overpaid. In 1924 Congress authorized the Director of the Veterans' Bureau to suspend payments to guardians who refused to account to him "from time to time showing the application of such payments for the benefit of such minor or incompetent beneficiary."<sup>41</sup> Two years later, the Congress authorized the Director to intervene in guardianship proceedings to

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<sup>38</sup> *Parker v. Wilson*, 98 Ark. 553, 136 S.W. 981 (1911); *In re Cannon*, 231 Iowa 366, 1 N.W.2d 217 (1941); *In re Morris' Guardianship*, 228 Iowa 646, 292 N.W. 836 (1940); *Erwin v. Patterson*, 229 S.C. 188, 92 S.E.2d 464 (1956); *Hines v. Thompson*, 25 Tenn. App. 86, 148 S.W.2d 376 (1940); *State ex rel. Wilson v. Meek*, 24 Tenn. App. 492, 146 S.W.2d 961 (1938); *McCuiston v. Haggard*, 21 Tenn. App. 277, 109 S.W.2d 413 (1937). See *In re Estate of Avchin*, 158 Misc. 388, 285 N.Y.S. 762 (Surr. Ct. 1936). But see *Hoffman v. Stoudemire*, 42 Ala. 593 (1868); *O'Hara v. Shepherd*, 3 Md. Ch. 306 (1851); *Marks v. Marks*, 58 Ohio App. 266, 16 N.E.2d 509 (1937); *Barrineau v. Barrineau*, 209 S.C. 317, 40 S.E.2d 41 (1946).

<sup>39</sup> The premium rates on United States Government (World War I) and National Service (World War II) Life Insurance are the same as those charged by commercial insurance companies except that the government beats the administrative expense and the extra cost of the risks of war. *Brief History of Legislation Pertaining to Veterans' Benefits*, 38 U.S.C.A. §§ 1-1500, at 31 (1959); 38 U.S.C. §§ 702, 744 (1970).

<sup>40</sup> Act of Aug. 9, 1921, ch. 57, 42 Stat. 147.

<sup>41</sup> Act of June 7, 1924, ch. 320, § 21, 43 Stat. 613.

present to the state court information as to misbehavior by guardians.<sup>42</sup>

In 1927 the Veterans' Bureau asked the National Conference of Commissioners on Uniform State Laws to approve a draft of a "Uniform Probate and Commitment Act" designed: (1) to compel state courts to recognize that the Veterans' Bureau was an interested party entitled to intervene in guardianship proceedings for persons to whom it was paying money; (2) to regulate the compensation of guardians of such persons; and (3) to empower state courts to commit mentally incompetent veterans to Veterans' Bureau hospitals.<sup>43</sup> In 1928 the National Conference and the American Bar Association approved a Uniform Veterans' Guardianship Act.<sup>44</sup> By the end of the following year, this or similar legislation was adopted in 33 states.<sup>45</sup>

The 1928 Uniform Veterans' Guardianship Act would not have created the problems involved in examples 1 (the Bates Farm) and 3 (the Pennyworth Stock) because: (1) it did not apply to former wards of the Veterans' Bureau;<sup>46</sup> (2) it did not require notice to the Veterans' Bureau of hearings on petitions for appointment of a guardian or authority to sell land;<sup>47</sup> and (3) it did not require a prior order of the court authorizing any type of investment.<sup>48</sup> Moreover, its restraints were limited to moneys received by a guardian from the Veterans' Bureau, so that it could have no application whatever to the Bates Farm, six dollars of the purchase price of which was paid by money received by Aaron Bates directly from the government in 1890, or to the law books provided directly to Quintilla Palmer's father in 1946.<sup>49</sup> The problem involved in example 2 (the Harrison Ranch) could have arisen under the 1928 Act, however,

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<sup>42</sup> Act of July 2, 1926, ch. 723, § 2, 44 Stat. 791 (codified at 38 U.S.C. § 3202 (1970)).

<sup>43</sup> 1929 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 368-72 [hereinafter cited as 1929 HANDBOOK].

<sup>44</sup> 1928 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 95-96, 100-06, 532-39 [hereinafter cited as 1928 HANDBOOK]. The text of the 1928 version of the U.V.G.A. is printed at 535-39.

<sup>45</sup> 1929 HANDBOOK 368-69. The name "Uniform Veterans' Guardianship Act" was misleading; the explanation promulgated with the Act made it clear that most of the minors and incompetents whose guardianships were affected were not veterans. 1928 HANDBOOK 532.

<sup>46</sup> U.V.G.A. § 1 (1928 version).

<sup>47</sup> *Id.* § 7.

<sup>48</sup> *Id.* § 12.

<sup>49</sup> *Id.* §§ 1, 9.

because it, like the 1942 version, required the petition for appointment of a guardian of an incompetent ward to show that she had been rated incompetent on examination by the Bureau.<sup>50</sup> The explanation promulgated with the Act suggests that the draftsmen did not appreciate the fact that the language of the Act included guardianships of incompetents who were not veterans.<sup>51</sup>

The problems of the Veterans' Bureau, which became the Veterans' Administration on July 21, 1930,<sup>52</sup> were greatly increased by legislation of 1930 authorizing payment of \$40 per month to disabled veterans whose disabilities were not connected with military service if their income was so small that they were exempt from federal income tax.<sup>53</sup> This added a large class of beneficiaries who were virtually destitute and whose guardians were likely to be so poor as to be under great temptation to divert part of these generous payments to their own support or that of their own families. In 1934 Congress further increased the class of pauper beneficiaries by authorizing payment of \$22 a month to destitute widows and children of deceased veterans of World War I who had had service-connected disabilities, even though death was not caused by a service-connected disability.<sup>54</sup> The result of this legislation was that Veterans' Administration lawyers were spending much of their time on guardianships of persons whose sole means of support was monthly payments made by the Veterans' Administration.

By 1941 the Veterans' Administration was advocating amendments to the 1928 Uniform Veterans' Guardianship Act and the National Conference of Commissioners on Uniform State Laws was considering revision of that Act.<sup>55</sup> In the following year, the National Conference and the American Bar Association approved the 1942 Uniform Veterans' Guardianship Act with which, as a result of

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<sup>50</sup> *Id.* § 4.

<sup>51</sup> 1928 HANDBOOK, *supra* note 44, at 532.

<sup>52</sup> *Brief History of Legislation Pertaining to Veterans' Benefits*, *supra* note 39, at 5.

<sup>53</sup> Act of July 3, 1930, ch. 849, § 11, 46 Stat. 995 (codified at 38 U.S.C. § 521 (1970)). In 1957 the means test was changed to annual income of \$1,400. Act of June 17, 1957, Pub. L. No. 85-56, § 422, 71 Stat. 106 (codified at 38 U.S.C. § 522 (1970)).

<sup>54</sup> Act of June 28, 1934, ch. 867, 48 Stat. 1281 (codified at 38 U.S.C. §§ 541-43 (1970)). The 1934 Act's means test was income so low as to be exempt from federal income tax. In 1939 the monthly pension was increased to \$30 and the means test changed to income not exceeding \$1,000 per annum. Act of July 19, 1939, ch. 331, §§ 1, 2, 53 Stat. 1069. The requirement of a service-connected disability was eliminated and the pension increased to \$35 per month by the Act of Dec. 14, 1944, ch. 581, §§ 1, 2, 58 Stat. 803.

<sup>55</sup> 1941 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 14, 96.



examples 1, 2, and 3, the reader is now familiar.<sup>56</sup> The most astonishing thing about the promulgation of this Act is its Prefatory Note,<sup>57</sup> which gives the impression that the Act is restricted to guardianships of disabled veterans. Neither that note nor the Commissioners' comments on section 2<sup>58</sup> give any reason whatever for the drastic change from the 1928 Act, which was limited to guardianships of persons presently receiving money from the Veterans' Bureau and moneys received by the guardian from that Bureau,<sup>59</sup> to the 1942 Act extension to guardianships of former wards with assets derived from moneys paid to anyone by a government agency dealing with veterans.

The defects of the 1942 Act have been illustrated by the three examples. First, it appears to make notice to the Veterans' Administration a prerequisite to jurisdiction in guardianship proceedings for any person who has ever received any money from the Veterans' Administration or a predecessor, if he has any asset derived in whole or in part from money paid by the Veterans' Administration or its predecessors to anyone.<sup>60</sup> How could a lawyer instituting a guardianship proceeding for Alice Fox in 1971 ascertain that she had received money from the Veterans' Bureau in 1925 and that six dollars of Civil War pension money was used in the purchase of the Bates Farm in 1890? How could a lawyer called in to obtain guardianship protection for a raving lunatic be sure that he did not receive a dividend in 1946 on a since-expired term National Service Life Insurance policy and that none of his land was ever owned by a veteran of the American Revolution, the Seminole War, or the Mexican War who used some pension money to pay for it? Second, the 1942 Act appears to require a rating of "incompetent" after examination by the Veterans' Administration as a prerequisite to jurisdiction in guardianship proceedings for any person presently entitled to receive money from the Veterans' Administration, even though the person is not a veteran and is not eligible for examination or

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<sup>56</sup> 1942 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 82-83, 85-86, 122, 201-23 [hereinafter cited as 1942 HANDBOOK]. The text of the 1942 version of the U.V.G.A. is printed at 206-23.

<sup>57</sup> 1942 HANDBOOK 201-05; 9C UNIFORM LAWS ANN. 318-22 (1957). See Davis, *The Uniform Veterans' Guardianship Act*, 3 ALA. LAWYER 185-93 (1942); Imlay, *Uniform Veterans' Guardianship Act*, 12 J. BAR ASS'N D.C. 378-86 (1945).

<sup>58</sup> 9C UNIFORM LAWS ANN. 325 (1957).

<sup>59</sup> U.V.G.A. §§ 1, 9 (1928 version).

<sup>60</sup> *Id.* § 2 (1942 version).

rating by the Veterans' Administration.<sup>61</sup> Third, the Act does not make it clear whether the restrictions imposed on administration of the ward's estate by the guardian extend to property not derived from money paid by the Veterans' Administration or its predecessors.<sup>62</sup> If those restrictions do extend to such property, they make economical and efficient management of a substantial portfolio of securities impossible.

### III. THE UNIFORM PROBATE CODE

The reporters who drafted the Uniform Probate Code between 1963 and 1969 were aware of the defects of the 1942 Uniform Veterans' Guardianship Act.<sup>63</sup> They did not wish to impair the ability of the Veterans' Administration to protect the veterans, and their widows and children, who were under guardianship and receiving disability compensation, dependency and indemnity compensation, or pensions. They saw no reason, however, to make any different provision for the Veterans' Administration than for other government agencies, providing similar benefits, such as the Social Security Administration. They could not see that any purpose of the Veterans' Administration was furthered by the overkill described in the three examples and they were particularly anxious to avoid the problem of transactions involving property of persons under guardianship being void for want of court jurisdiction because those conducting the guardianship proceeding were unable to ascertain that the Veterans' Administration was an interested and necessary party. The reporters sought to supersede both the existing general guardianship laws and the Uniform Veterans' Guardianship Act with a single system for protection of minors and mental incompetents, with proper recognition of the interests of the Veterans' Administration and all like agencies providing similar benefits for minors and mental incompetents.

The Uniform Probate Code was approved by the National Conference of Commissioners on Uniform State Laws and the American

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<sup>61</sup> See text accompanying notes 23-26 *supra*.

<sup>62</sup> U.V.G.A. § 22 (1942 version); MO. ANN. STAT. §§ 475.015, 475.475 (1956). See *Krupp v. Franklin Sav. Bank*, 255 App. Div. 15, 5 N.Y.S. 2d 365 (1938); *In re Parker*, 168 Tenn. 327, 330-31, 77 S.W.2d 816, 817 (1935). But see *DeWald v. Morris*, 397 S.W.2d 738 (Mo. App. 1965).

<sup>63</sup> See Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264-68 (1960), and Fratcher, *Toward Uniform Guardianship Legislation*, 64 MICH. L. REV. 983, 987-90 (1966), combined and revised in 2 LANDMARK PAPERS ON ESTATE PLANNING, WILLS, ESTATES AND TRUSTS 942, 944-48 (A. Winard ed. 1968).

Bar Association in August 1969.<sup>64</sup> Article V of the Code, *Protection of Persons Under Disability and Their Property*, relates to protection of the persons and property of minors and mental incompetents.<sup>65</sup> Under this article protection of the person is provided by the appointment of a guardian,<sup>66</sup> protection of the property of a person under disability is provided by protective proceedings which may include the appointment of a conservator of the estate.<sup>67</sup>

Under Article V a parent of an unmarried minor may appoint a guardian of his child by will,<sup>68</sup> and a spouse or parent of a mental incompetent may appoint a guardian of the incompetent by will.<sup>69</sup> The intended ward, however, has standing to object to a testamentary appointment of a guardian if the ward has reached the age of fourteen.<sup>70</sup> The court may appoint a guardian for a mental incompetent.<sup>71</sup> If there is no parent or testamentary guardian, it may appoint a guardian for an unmarried minor.<sup>72</sup> The court may remove a guardian, whatever the source of his appointment, upon pe-

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<sup>64</sup> 1969 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 101-06; 94 A.B.A. REP. 400 (1969). The text of the Code does not appear in either the Handbook or the Report. A preliminary version was published in *Wills, Estates and Trust Serv. Bull.* 6 in P-H EST. PLAN. (1969). UNIFORM PROBATE CODE — OFFICIAL TEXT WITH COMMENTS (West Publishing Co. 1970, reprinted with index 1972) [hereinafter cited as U.P.C.] is a revised version. The latter version, with slight changes, is in 8 UNIFORM LAWS ANN. 281-592 (Master ed. 1972).

<sup>65</sup> U.P.C. §§ 5-101 to -502. These provisions are discussed in Fratcher, *Missouri and the Uniform Probate Code*, 26 J. MO. B. 349, 357-59 (1970), and in Fratcher, *Estate Planning and Administration Under the Uniform Probate Code*, 110 TRUSTS & ESTATES 5, 73-74 (1971) and at greater length in Fratcher, *Persons Under Disability* in UNIFORM PROBATE CODE PRACTICE MANUAL 195-250, 417-71 (R. Wright ed. 1972) [hereinafter cited as PRACTICE MANUAL].

<sup>66</sup> U.P.C. §§ 5-201 to -313.

<sup>67</sup> *Id.* §§ 5-401 to -413.

<sup>68</sup> U.P.C. § 5-202. Such an appointment does not take effect while the child has a living parent competent to care for him. If both parents are dead, an appointment by the parent who died last has priority. For a form of appointment by will, see PRACTICE MANUAL Form 104, at 432.

<sup>69</sup> U.P.C. § 5-301. An appointment by the spouse has priority over one by a parent. As between appointments by parents, the priorities are the same as in the case of an unmarried minor. See note 68 *supra*. For a form of appointment by will, see PRACTICE MANUAL Form 112, at 442.

<sup>70</sup> U.P.C. §§ 5-203, -301(d). The intended ward might do this because he objects to the person appointed as guardian or, if the testamentary appointment is made on the theory of mental incapacity, because he does not concede that he is incompetent. For an example form, see PRACTICE MANUAL Form 113, at 445 (objection based on place of residence of testamentary guardian).

<sup>71</sup> U.P.C. §§ 5-303, -304. For forms of appointment order, see PRACTICE MANUAL Form 99, at 424-25; Form 122, at 457-58 (appointment of a United States naval hospital as guardian of a retired officer of the Regular Navy).

<sup>72</sup> U.P.C. § 5-204. For a form of appointment order, see PRACTICE MANUAL Form 109, at 438.

tition of any person interested in the welfare of the ward.<sup>73</sup> A testamentary appointment as guardian of a mental incompetent may be accepted only after notice to any organization "having his care or to his nearest adult relative."<sup>74</sup> An organization that "has his care and custody" is entitled to notice of hearing in a court proceeding for appointment or removal of the guardian of a mental incompetent.<sup>75</sup> An organization that "is caring for him or paying benefits to him" may nominate "any competent person or a suitable institution" for appointment as guardian of a mental incompetent.<sup>76</sup>

A guardian of a minor is bound to "take reasonable care of his ward's personal effects and commence protective proceedings if necessary to protect other property of the ward."<sup>77</sup> He may "receive money payable for the support of the ward . . . under the terms of any statutory benefit . . . system," and apply them to the ward's current needs for support, care, and education. Furthermore,

[h]e must exercise due care to conserve any excess for the ward's future needs unless a conservator has been appointed for the estate of the ward, in which case excess shall be paid over at least annually to the conservator. . . . A guardian may institute proceedings to compel the performance by any [organization] of a duty to support the ward or to pay sums for the welfare of the ward. . . . A guardian must report the condition . . . of the ward's estate which has been subject to his possession or control, as ordered by the Court on petition of any person interested in the minor's welfare or as required by Court rule.<sup>78</sup>

A guardian of a mental incompetent has the same duties and, if a conservator has not been appointed, similar powers as to money and property.<sup>79</sup>

Although a guardian of a minor has power to institute proceedings to get some kinds of Veterans' Administration pecuniary benefits for his ward, he may not be able to compel their payment to him-

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<sup>73</sup> U.P.C. §§ 5-212, -307.

<sup>74</sup> U.P.C. § 5-301 as explained by § 1-210(29). For a form of notice to an organization caring for the ward, see PRACTICE MANUAL Form 112, pt. 3, at 442-43.

<sup>75</sup> U.P.C. § 5-309 as explained by § 1-201(29). For forms of notice and proof of service, see PRACTICE MANUAL, Form 98, at 423 (notice to the Veterans' Administration); Form 120, at 454-55.

<sup>76</sup> U.P.C. § 5-311 as explained by § 1-201(29). For forms of nomination, see PRACTICE MANUAL, Forms 94, 95, at 417-20; Forms 117, 118, at 450-52.

<sup>77</sup> U.P.C. § 5-209(a).

<sup>78</sup> U.P.C. § 5-209(b), (d), as explained by § 1-201(29). See also U.P.C. § 5-103. For a form of receipt by the guardian for money paid for the support of a minor ward, see PRACTICE MANUAL, Form 103, at 430-31.

<sup>79</sup> U.P.C. § 5-312. For a form of receipt by the guardian for property deliverable to a mentally incompetent ward, see PRACTICE MANUAL, Form 110, 439-40.

self because federal statutes permit the Veterans' Administration, under some conditions, to pay the ward directly or to pay someone else for his benefit instead of paying a guardian or conservator appointed under state law.<sup>80</sup>

A guardian's powers over property of his ward are limited to (1) receipt on behalf of the ward of money or property voluntarily paid or delivered, (2) application of such money to the support, care, and education of the ward, and (3) preservation of both excess money paid to him and of other property of the ward. If litigation is needed to collect money or property for the ward or if there is need for authority to invest money; to sell, mortgage, exchange or lease property; to enter into contracts; or to exercise powers of the ward, protective proceedings are necessary. Under Article V of the Uniform Probate Code, the powers of the court in protective proceedings over the protected person's property and affairs are much broader than those traditionally held by the courts which supervise guardians of the estates of minors and mental incompetents.<sup>81</sup> In protective proceedings for a minor, "[T]he Court has all those powers over the estate and affairs of the minor which are or might be necessary for the best interests of the minor, his family and members of his household."<sup>82</sup> In protective proceedings for a mental incompetent,

the Court has, for the benefit of the person and members of his household, all the powers over his estate and affairs which he could exercise if present<sup>[83]</sup> and not under disability, except the power to make a will.<sup>[84]</sup> These powers include, but are not limited

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<sup>80</sup> 38 U.S.C. § 3202 (1970); 38 C.F.R. §§ 13.55-.64, 13.70-103, 13.105 (1972); see Act of June 7, 1924, ch. 320, § 21, 43 Stat. 613. The Social Security Administration has much broader authority to pay benefits to its own designee instead of to a state-appointed guardian or conservator. 42 U.S.C. § 405(j) (1970); 20 C.F.R. §§ 404.1601-.1610 (1971).

<sup>81</sup> See articles cited note 63 *supra*; 45 IOWA L. REV. 264, 268-320; 64 MICH. L. REV. 983, 984-85, 997-1000.

<sup>82</sup> U.P.C. § 5-408(2).

<sup>83</sup> The words "if present" refer to the fact that protective proceedings under Article V of the Uniform Probate Code are not limited to minors and mental incompetents. Such proceedings may be instituted for competent adults who are unable to manage their own property and affairs effectively for such reasons as confinement (*e.g.*, in a penitentiary), detention by a foreign power (*e.g.*, as a prisoner of war), or disappearance. See U.P.C. § 5-401(2). The Code creates a presumption that a missing person died at the end of five years after his disappearance. See U.P.C. § 1-107(3). During the five year period protective proceedings may be appropriate. For a form of petition for appointment of a conservator of the estate of a prisoner of war, see PRACTICE MANUAL Form 126, at 466-67.

<sup>84</sup> Although the court lacks power to make a will for a protected person, it can accomplish the same result by creating an *inter vivos* trust of his property with beneficiaries who are to take it after his death.

to power to make gifts, to convey or release his contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety, to exercise or release his powers as trustee, personal representative, custodian for minors, conservator, or donee of a power of appointment, to enter into contracts, to create revocable or irrevocable trusts of property of the estate which may extend beyond his disability or life, to exercise options of the disabled person to purchase securities or other property, to exercise his rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value, to exercise his right to an elective share in the estate of his deceased spouse and to renounce any interest by testate or intestate succession or by *inter vivos* transfer.<sup>85</sup>

In protective proceedings the court may exercise its powers directly, without appointing a conservator.<sup>86</sup> In the situation described in example 2 (the Harrison Ranch),<sup>87</sup> if the attending physicians thought that Gertrude Jones would emerge from the coma or die within a few weeks, it would be possible for the court to direct its clerk to execute an oil lease of the Harrison Ranch to Criterion Oil Company (Ohio). When, however, continuing management of property is likely to be needed, the normal procedure would be for the court to appoint a conservator of the estate of the protected person.

An individual, bank, or trust company may be appointed conservator.<sup>88</sup> The court may, but need not, require the conservator to furnish a bond.<sup>89</sup> The court may restrict the powers of a conservator by the terms of, or later endorsement on, his letters of appointment.<sup>90</sup> Thus it could restrict his powers to those of a guardian of the estate under the Uniform Veterans' Guardianship Act, so that he could not invest in anything but government securities without prior order of the court.<sup>91</sup> In the absence of such restrictions, a conservator has title as trustee to all property of the protected person<sup>92</sup> and has power, without prior court authorization or subsequent court approval, to make any investment which a trustee could make, to

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<sup>85</sup> U.P.C. § 5-408(3).

<sup>86</sup> U.P.C. § 5-409. For forms of petitions praying that the court, without appointing a conservator, enter an order exercising a power of appointment held by a person under disability, see PRACTICE MANUAL Form 125, at 462-65.

<sup>87</sup> Text accompanying notes 20-28 *supra*.

<sup>88</sup> U.P.C. § 5-410. For a form of order appointing an individual as conservator, see PRACTICE MANUAL Form 99, at 424-25.

<sup>89</sup> U.P.C. §§ 5-411, 5-412.

<sup>90</sup> U.P.C. § 5-426.

<sup>91</sup> U.P.C. § 5-426, Comment; U.V.G.A. § 13 (1942 version).

<sup>92</sup> U.P.C. § 5-420.

sell, mortgage, or lease land or other property, to erect improvements, and to pay or settle claims against the protected person or his estate.<sup>93</sup> A conservator must account to the court upon resignation or removal and at other times as the court may direct.<sup>94</sup> Though not required by the Uniform Probate Code, the court could direct him to conform to the accounting requirements imposed on a guardian by the Uniform Veterans' Guardianship Act.<sup>95</sup> Unless otherwise directed, however, he need not account to the court on termination of the protected person's minority or disability (by death or otherwise) if he accounts to the former protected person or his personal representative.<sup>96</sup>

Like the provisions of the Uniform Probate Code as to administration of decedents' estates, the prominent feature of the Code provisions as to conservators is flexibility. If the court appoints as conservator the protected person's impoverished relative who is ignorant, inexperienced, possibly untrustworthy, and deficient in financial responsibility, it can require him to furnish a bond with dependable sureties, to account to the court annually and at the termination of the conservatorship, to exhibit investment securities at the time of accounting, and to secure a prior order of court before paying a claim, giving a lease or mortgage, making a sale, or investing in anything but government bonds. This is the regime imposed by the Uniform Veterans' Guardianship Act. If, on the other hand, the conservator is a bank, a trust company, or an experienced and reputable businessman with ample means for responding in damages for maladministration, the court may permit him to serve with full powers without bond or accounting to the court. In effect, it may put him in exactly the same position as a trustee under an *inter vivos* trust instrument conferring broad administrative powers.

Any person who is interested in the estate, affairs, or welfare of the person to be protected may institute protective proceedings.<sup>97</sup> Any governmental agency paying or planning to pay benefits to the

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<sup>93</sup> U.P.C. § 5-424. This section follows, generally, the UNIFORM TRUSTEES POWERS ACT.

<sup>94</sup> U.P.C. § 5-419.

<sup>95</sup> U.V.G.A. §§ 10, 11, 17 (1942 version). These sections require a guardian who has received or shall receive on account of his ward anything of value from the Veterans' Administration, on penalty of removal, to file an account annually with the court, exhibit the securities held by him, send a copy of the account to the Veterans' Administration, and have the account allowed by the court at a hearing held after fifteen days' notice to the Veterans' Administration. The same procedure is required at the termination of the guardianship.

<sup>96</sup> U.P.C. § 5-419.

<sup>97</sup> *Id.* § 5-404.

protected person is an interested person.<sup>98</sup> Notice of the hearing on the initial petition in a protective proceeding must be served on the person to be protected, his spouse and parents, any interested person who has filed a request for notice, and such other persons as the court may direct.<sup>99</sup> The petition must allege, to the extent known, "any compensation, insurance, pension or allowance to which" the person to be protected is entitled.<sup>100</sup> An allegation that the person to be protected is entitled to compensation or pension from the Veterans' Administration would, presumably, result in that agency being notified, but the court would not be deprived of jurisdiction because of failure, due to ignorance or inadvertence, to give such notice.<sup>101</sup> In any event, the Veterans' Administration would soon find out about the proceeding and any interested person, including any governmental agency paying or planning to pay benefits to the person to be protected, may file a request for notice, after which it is entitled to notice before the entry of any order in the proceeding.<sup>102</sup> An organization that is caring for or paying benefits to the person to be protected is entitled to consideration of its nomination of an individual or corporation for appointment as conservator.<sup>103</sup> A governmental agency which is paying or planning to pay benefits to the protected person may petition for an order (1) requiring the conservator to furnish bond or security or additional bond or security, (2) requiring the conservator to account, (3) removing the conservator and appointing another, or (4) granting other appropriate relief.<sup>104</sup> These provisions, coupled with its federal statutory power to refuse to pay benefits to a conservator who neglects or refuses to account to it<sup>105</sup> would seem to afford the Veterans' Administration ample authority to continue its long-established practice of supervising guardians and conservators of its beneficiaries.<sup>106</sup>

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<sup>98</sup> *Id.* § 5-406.

<sup>99</sup> *Id.* § 5-405. For forms, see PRACTICE MANUAL Form 98, at 423 (notice to Veterans' Administration); Form 127, at 468 (order directing notice by publication to prisoner of war in enemy hands); Form 128, at 469 (notice by publication).

<sup>100</sup> U.P.C. § 5-404(b). For a form of petition stating that the person to be protected is entitled to a pension for service in the Spanish American War, see PRACTICE MANUAL Form 94, at 417-19.

<sup>101</sup> Compare text accompanying notes 3-19 *supra*.

<sup>102</sup> U.P.C. § 5-406. For a form of request for notice filed by the Veterans' Administration, see PRACTICE MANUAL Form 97, at 422.

<sup>103</sup> U.P.C. § 5-410. Cf. form of order appointing a naval hospital guardian of a retired naval officer on nomination of the Navy. PRACTICE MANUAL Form 122, at 457.

<sup>104</sup> U.P.C. §§ 5-406, -416 as explained by § 1-201(29).

<sup>105</sup> 38 U.S.C. § 3202 (1970).

<sup>106</sup> Notes 40-43 *supra* & accompanying text.



#### IV. THE UNIFORM PROBATE CODE AND THE VETERANS' ADMINISTRATION

The Uniform Probate Code was promulgated in August 1969.<sup>107</sup> Some three months later the Veterans' Administration issued a circular to its state chief attorneys, who represent it in guardianship proceedings in state courts and before committees of state legislatures.<sup>108</sup> The circular mentioned the adoption of the Uniform Probate Code by the National Conference of Commissioners on Uniform State Laws and the American Bar Association and stated:

The proposed code represents a philosophy of "hands off" by the court in protective proceedings after a conservator is appointed. Strengthening of the code is necessary at least as to beneficiaries of government agencies. The flagrant misuse and embezzlement of funds of disabled veterans and their dependents before the Guardianship Service was established and the Uniform Veterans' Guardianship Act or similar legislation was enacted, are well-known. A need for these basic protective services continues. Cases occur in every state each year which demonstrate the efficacy of protecting the estates of the disabled.<sup>[109]</sup>

. . . .

. . . There have been prepared some suggested amendments in [sic] the Uniform Probate Code which will strengthen it without emasculating it . . . . In developing these amendments, it has been our intention to preserve the basic intent of the drafter of the code.<sup>[110]</sup>

. . . .

. . . The code, when enacted, will replace the Uniform Veterans' Guardianship Act. Its modification is required to permit the Guardianship Service to function effectively under state law in safeguarding VA benefits due persons under legal disability because of minority or mental illness.<sup>[111]</sup>

. . . .

. . . In the case of the Uniform Probate Code, it is imperative that the Chief Attorney do more than merely submit amendments along the lines suggested here. He must actively advocate them and do his utmost to see that they are given serious consideration. . . .<sup>112</sup>

The circular did not propose any amendment to the provisions

<sup>107</sup> See note 64 *supra*.

<sup>108</sup> Veterans' Administration, Dep't of Veterans' Benefits Circular 27-69-8, Dec. 8, 1969 [hereinafter cited as 1969 Circular].

<sup>109</sup> *Id.* § 3(c).

<sup>110</sup> *Id.* § 4.

<sup>111</sup> *Id.* § 1.

<sup>112</sup> *Id.* § 2.

of the Uniform Probate Code which relate to guardianship.<sup>113</sup> Several of the proposals made by the circular were fully consistent with the circular's professed intention of strengthening the Code without emasculating it and of preserving the basic intent of the drafters of the Code. One such proposal was for amendment of the section relating to notice at the inception of protective proceedings, but it was limited to clarification and simplification of the notice procedure;<sup>114</sup> it did not propose to revive the objectionable features of sections 2 and 5 of the Uniform Veterans' Guardianship Act involved in examples 1 (the Bates Farm)<sup>115</sup> and 2 (the Harrison Ranch).<sup>116</sup> A second was for modification of the section relating to court appointment of an attorney for the person to be protected.<sup>117</sup> A third proposal was for clarification of the section relating to the status of previously appointed guardians and conservators after the effective date of the Uniform Probate Code.<sup>118</sup> A fourth expressed the need for legislation like section 18 of the Uniform Veterans' Guardianship Act, empowering state courts to commit mentally incompetent veterans to Veterans' Administration hospitals.<sup>119</sup> The Uniform Probate Code does not deal with commitment proceedings for mental incompetents so its enactment would not be inconsistent with keeping section 18 of the Uniform Veterans' Guardianship Act in force.<sup>120</sup>

Four other proposals for amendment made by the circular were not, in the opinion of draftsmen of the Uniform Probate Code, consistent with the circular's professed intention of not emasculating the Code or disturbing the basic intent of its drafters.

Paragraph 7 of the circular proposed the following addition to section 5-411:

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<sup>113</sup> U.P.C., art. V, pts. 2 & 3; *see* notes 68-80 *supra* & accompanying text. The 1969 Circular § 15 explains this by saying:

It is not anticipated that the VA will seek the appointment of a guardian under the code, but when a court fiduciary is required, a conservator will be appointed. This will not prevent the certification [for receipt of VA benefits] of a code guardian when he has already been appointed and when the situation is such that a legal custodian would be recognized but for the existence of the guardian. Code guardians so recognized will be supervised in the same manner as legal custodians.

<sup>114</sup> 1969 Circular § 5 proposing amendment of U.P.C. § 5-405.

<sup>115</sup> Text accompanying notes 2-6 *supra*.

<sup>116</sup> Text accompanying notes 23-26 *supra*.

<sup>117</sup> 1969 Circular § 6 proposing amendment of U.P.C. § 5-407.

<sup>118</sup> *Id.* § 13, proposing amendment of U.P.C. § 8-101.

<sup>119</sup> *Id.* § 14; U.V.G.A. § 18 (1942 version).

<sup>120</sup> U.P.C. § 5-312(a)(1); *see* § 5-304 comment.

(b) When any government agency is paying or planning to pay benefits to a person to be protected, *or* his estate includes assets derived in whole, or in part, from benefits heretofore paid by the agency, the court *shall*, upon the request of the agency, require a conservator to furnish a bond . . . in an amount not less than the aggregate capital value of the property of the estate derived from agency benefits in his control plus one year's estimated income from the agency but less . . . the value of any land purchased with agency benefits which the fiduciary, by express limitation of power, lacks power to sell or convey without court authorization.<sup>121</sup>

It is noteworthy that this provision would make a bond, or a restriction in the conservator's letters depriving him of power of sale without special court authorization,<sup>122</sup> mandatory at the option of any government agency, if the protected person owned any land derived in whole or in part from benefits paid by the agency, even though the agency was not paying or planning to pay any benefit to him. Since virtually all land west of the Appalachian Mountains was granted by the United States, the Bureau of Land Management<sup>123</sup> would seem to be empowered to compel every conservator holding such land to furnish bond or forfeit his power of sale. Even if the land was not originally granted by the United States, the provision would be triggered if, for example, the protected person owned a farm and either (1) his great-great-great-grandfather used \$10 of Mexican War pension in paying for the farm in 1847;<sup>124</sup> (2) his great-great-grandfather used Civil War bounty money<sup>125</sup> to erect a hog sty on the farm; (3) his great-grandfather used proceeds of a sale of beans to the Navy Department in 1898 to erect a barn on the farm; (4) his grandfather used his pay as a mail carrier to erect a house on the farm; or (5) his father used a payment made to him by the Coast Guard under the Federal Tort Claims Act<sup>126</sup> to build a tractor shed on the farm. If all of these uses of federal benefits occurred, the Veterans' Administration, the Department of the Army, the Department of the Navy, the United States Postal Service, or the Coast Guard could compel the conservator to furnish bond for the full value of the farm or give up his power to sell it, whether or not

<sup>121</sup> 1969 Circular § 7 (emphasis added).

<sup>122</sup> See notes 90-93 *supra* & accompanying text.

<sup>123</sup> The Bureau of Land Management acquired the functions of the General Land Office by Reorganization Plan No. 3 of 1946, pt. IV, § 403 (codified at 5 U.S.C. 517 (1970)).

<sup>124</sup> See Act of March 16, 1802, ch. 9, § 14, 2 Stat. 135; Act of May 13, 1846, ch. 16, § 7, 9 Stat. 10.

<sup>125</sup> See Act of July 22, 1861, ch. 9, § 5, 12 Stat. 269; Act of July 29, 1861, ch. 24, § 5, 12 Stat. 280; Act of July 5, 1862, ch. 133, § 6, 12 Stat. 509.

<sup>126</sup> 28 U.S.C. § 2672 (1970).

the agency was paying or planning to pay benefits to the protected person. This is overkill with a vengeance.

Paragraph 8(b) of the circular proposed to amend section 5-414<sup>127</sup> to provide:

When the estate is derived, in whole or in part, from moneys being paid by a government agency, the compensation allowed from such moneys to the conservator shall be limited to five percent of the amount of moneys received from the agency during the period covered by the account. . . . No commission or compensation shall be allowed on the moneys or other assets received from a prior fiduciary nor upon the amount received from liquidation of loans or other investments.<sup>128</sup>

The five percent restriction is not limited to donative benefits from a government agency; it extends to military and civil service retirement pay and money paid to a government construction contractor. For example, if the protected person were a construction contractor engaged in building runways on Air Force bases and the conservator was running his business for him, this restriction might work very badly when the Air Force payments were at irregular intervals based on times of project completion. Moreover, there might be wholly inadequate compensation for the conservator's services during a particular period. The first sentence of the proposed amendment may mean that the conservator is entitled to no compensation whatever for managing investments purchased with money paid by a government agency. Finally, the last sentence could be construed to mean that a conservator appointed to succeed a conservator who had died or resigned could receive no compensation at all for managing assets handled by the former conservator. If these included an office building, an apartment house, or a factory, this would be grossly unfair. The last sentence is not expressly limited to assets derived from government agencies and so might apply when the protected person had no assets derived wholly, or in part, from moneys paid by a government agency. Perhaps this is unimportant because no one except a very recent immigrant is likely to be without any asset derived, wholly or in part, from some money paid by some government agency to someone at some time. Nearly everyone has received at least an income tax refund.

Paragraph 9(b) of the circular proposed to amend section 5-419<sup>129</sup> to provide as follows:

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<sup>127</sup> This section entitles a conservator to "reasonable compensation."

<sup>128</sup> 1969 Circular ¶ 8.

<sup>129</sup> See text accompanying notes 94-96 *supra*.

(a) Every conservator must account to the court for his administration of the trust upon his resignation or removal or when the estate was derived, in whole or in part, from moneys paid by a government agency upon termination of protected person's minority or disability, and at other times as the court may direct. . . .

(b) Any government agency which *has paid* or is paying benefits for the protected person is entitled to a copy of any account filed. . . . Each year in which an account is not filed with the court, the conservator shall, if requested, submit an account to the appropriate government agency. If such an account is not submitted as requested, or if it is found unsatisfactory by the agency, the court shall, upon receipt of notice thereof, require the conservator forthwith to file an account with the court.<sup>130</sup>

The proposed section 5-419(a) would require a conservator to account to the court whenever the estate is derived, in whole or in part, from moneys paid by a government agency even though neither the conservator nor the protected person himself has ever received any money from a government agency. Hence this provision would be triggered by anything which would bring the amendment proposed by paragraph 7 into operation.<sup>131</sup> Consequently, this proposal would nullify the provision for accounting to the protected person or his executor<sup>132</sup> in substantially all cases involving land or other property previously owned by others. The proposed section 5-419(b) would entitle every government agency which has ever paid money to the protected person to a copy of every account of the conservator. If the protected person (1) served in the Marine Corps between 1943 and 1945; (2) received a National Service Life Insurance dividend in 1946; (3) worked as a typist for the Federal Bureau of Investigation in 1947; (4) received insurance proceeds for loss of a parcel post package in 1948; (5) was awarded \$20 under the Federal Tort Claims Act in 1949 as a result of a collision with a National Forest Service truck; (6) received benefits in 1950 from the Federal Deposit Insurance Corporation incident to a bank failure; (7) sold some vegetables to the Quartermaster Corps in 1951; (8) received an income tax refund in 1952; (9) was assisted by a United States consul in a foreign country in 1953; and (10) received a payment in 1954 from the Department of Agriculture for not growing wheat, his conservator would be obliged to furnish copies of his accounts to all ten government agencies, although none of them is currently paying benefits to the protected person, none has any interest in the protective proceedings, and none would do

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<sup>130</sup> 1969 Circular J 9 (emphasis added).

<sup>131</sup> See text accompanying notes 121-26 *supra*.

<sup>132</sup> See text accompanying notes 94-96 *supra*.

anything with the copies of accounts sent to it. This is overkill to the point of sheer absurdity. It would make protective proceedings so expensive that only the wealthy could afford them.

Paragraph 12 of the circular proposed to amend section 5-426<sup>133</sup> by adding the following subparagraph:

(c) Sections 5-424<sup>[134]</sup> and 5-425(a) and (b)<sup>[135]</sup> shall not apply to benefits paid by a government agency or to any estate derived therefrom. A conservator shall not, except upon petition to and prior order of the court after hearing, . . . make any investments with such funds except in direct unconditional interest-bearing obligations of this state or the United States and in obligations, the interest and principal of which are unconditionally guaranteed by the United States.<sup>136</sup>

This provision would deprive a conservator of virtually all of his powers of investment, administration, and distribution, without special court authorization, as to assets derived from benefits paid by any government agency, even though the protected person himself has never received benefits from a government agency and no government agency plans to pay him benefits or has any other interest whatever in the conservatorship. This would seem to include property purchased by anyone at any time in the past with money paid to anyone in the past by any government agency, even though the payments were due under government contracts, as bank deposit or crop insurance proceeds, or were of civilian or military pay for services rendered. There being no possible way to determine whether particular property was, at some time, derived from government benefits paid to someone, the net effect would be to make it unsafe for anyone to buy property from or otherwise deal with a conservator unless he secured prior court authorization for the transaction. No one would have merchantable title to land if there were a conservator's deed in the chain of title and no court order. In many cases, a conservator could not safely invest funds without such an order although neither he nor the protected person ever received

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<sup>133</sup> See text accompanying notes 90-91 *supra*.

<sup>134</sup> See text accompanying note 93 *supra*.

<sup>135</sup> U.P.C. § 5-425(a) and (b) empower a conservator to expand or distribute income or principal of the estate without court authorization or confirmation for the support, education, care, or benefit of the protected person and his dependents, including his dependent parents, under carefully prescribed statutory guidelines and, if the estate is ample, to make gifts to charity and other objects as the protected person might have been expected to make, in amounts which do not in total for any year exceed 20 percent of the income from the estate.

<sup>136</sup> 1969 Circular ¶ 12(b). The second sentence is derived from § 13 of the U.V.G.A. (1942 version).

a cent from any agency of the United States. The overkill of this provision would be far worse than anything in the Uniform Veterans' Guardianship Act, bad as it is.

Several months after the issuance of the December 1969 circular,<sup>137</sup> the Veterans' Administration sought to learn the views of the draftsmen of the Uniform Probate Code as to the desirability of the amendments proposed by that circular. It learned them. In September 1970 the Veterans' Administration issued a new circular, superseding that of December 1969, that indicated a clear shift from its previous position.<sup>138</sup>

The revised circular modifies the amendment proposed by paragraph 7 of the original circular<sup>139</sup> so as to require a conservator to furnish a bond, upon request of the Veterans' Administration, only "[w]hen the Veterans' Administration is paying or planning to pay benefits to a person to be protected, *or* his estate includes assets derived, in whole or in part, from benefits paid by the Veterans' Administration *to the conservator or his predecessor for the benefit of such person.* . . ."<sup>140</sup>

The revised circular also modifies the first sentence of the amendment proposed by paragraph 8 of the original circular<sup>141</sup> to restrict it to "money paid or being paid by the Veterans' Administration to the conservator or his predecessor for the benefit of the protected person. . . ."<sup>142</sup>

In addition, the revised circular modifies the amendment proposed by paragraph 9 of the original circular<sup>143</sup> so as to restrict the requirement of a conservator's accounting to the court upon termina-

<sup>137</sup> See note 108 *supra*.

<sup>138</sup> Veterans' Administration, Dep't of Veterans' Benefit Circular 27-69-8, revised as of Sept. 25, 1970 [hereinafter cited as 1970 Circular]. The 1970 Circular stated § 3(c):

In December 1969, amendments to the code were proposed in DVB Circular 27-69-8. Comments on these indicate concern on the part of the drafters of the code that the language used was too broad and would apply the provisions of the amendments to cases in which the Federal Government has no interest. This, in turn, would lead to complications in the affairs of protected persons and cloud the title to property sold by a conservator. It must be conceded there is some basis for this concern. With this in mind, the amendments to the code have been redrafted as they appear here. For the most part, they are limited in application to VA benefits paid for a specific beneficiary while legally disabled. . . .

<sup>139</sup> See note 121 *supra* & accompanying text.

<sup>140</sup> 1970 Circular § 7(b) (emphasis added).

<sup>141</sup> See note 128 *supra* & accompanying text.

<sup>142</sup> 1970 Circular § 8(b).

<sup>143</sup> See note 130 *supra* & accompanying text.

tion of the protected person's minority or disability to situations in which the estate is derived, in whole or in part, from moneys paid by the Veterans' Administration to the conservator or his predecessor for the benefit of the protected person. It entitles only the Veterans' Administration to a copy of the account and only "where the estate consists, in whole or in part, of benefits paid by the Veterans' Administration to the conservator or his predecessor for the benefit of the protected person . . . ." <sup>144</sup>

Finally, the revised circular modifies the amendment proposed by paragraph 12 of the original circular<sup>145</sup> so as to provide that "Sections 5-424 and 5-425(a) and (b) shall not apply to benefits paid by the Veterans' Administration to the conservator or his predecessor for the benefit of the protected person or to any estate derived therefrom."<sup>146</sup>

The amendments proposed by the revised circular resemble the 1928 version of the Uniform Veterans' Guardianship Act,<sup>147</sup> which was much less objectionable than the 1942 version.<sup>148</sup> They would not invalidate the sale of the Bates Farm described in example 1 because no guardian or conservator of Alice Fox received any money from the Veterans' Administration and the amendments do not include an equivalent of section 2 of the Uniform Veterans' Guardianship Act.<sup>149</sup> The amendments proposed by this circular would not invalidate the oil lease of the Harrison Ranch described in example 2 because the Harrison Ranch was not derived from benefits paid by the Veterans' Administration to the guardian of the estate of Gertrude Jones and the amendments do not include an equivalent of the provision of section 5 of the Uniform Veterans' Guardianship Act<sup>150</sup> requiring a petition for the appointment of a guardian or conservator to allege that the ward has been rated incompetent by the Veterans' Administration on examination. The amendments proposed by the revised circular would not invalidate the court order described in example 3 authorizing purchase of 100 shares of S. S. Pennyworth stock because the purchase was to be made with funds not paid to the guardian of Quintilla Palmer by the Veterans' Administration. They would, however, prevent Quintilla Palmer from

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<sup>144</sup> 1970 Circular ¶ 9(b).

<sup>145</sup> See note 136 *supra* & accompanying text.

<sup>146</sup> 1970 Circular ¶ 12(c).

<sup>147</sup> Note 44 *supra*.

<sup>148</sup> Note 56 *supra*.

<sup>149</sup> Note 6 *supra* & accompanying text.

<sup>150</sup> Note 23 *supra* & accompanying text.



taking advantage of her preemptive right to purchase an additional 100 shares<sup>151</sup> because her guardian attempted to make that purchase with funds derived in part from payments made to him by the Veterans' Administration.<sup>152</sup>

On March 12, 1971, the Joint Editorial Board for the Uniform Probate Code accepted a proposal for amendment of the Code to require personal service of notice on a person having the care and custody of a person to be protected,<sup>153</sup> and indicated willingness to add to section 5-416<sup>154</sup> a provision to the effect that, on petition by any governmental agency paying benefits to a protected person, the court should give special weight to agency investment, compensation, and disposition standards established to assist the agency discharge its obligation of seeing that governmental payments are applied to purposes for which they are intended. The Joint Editorial Board was unwilling to accept the other amendments proposed by the Veterans' Administration and expressed hope that the revised circular of September 25, 1970,<sup>155</sup> could be withdrawn. The Veterans' Administration declined to withdraw the circular in a letter from the Director of its Guardianship Service which suggests with admirable clarity and precision the real issue involved:

The UPC contemplates and the efficacy of its proposals are dependent on 'full power, high status' courts. This concept simply flies in the face of judicial reality. As you gentlemen are well aware, probate matters are currently handled among the various states in courts ranging from superior courts of general jurisdiction to courts presided over by laymen. The statutory structure suggested by the VA provides guidelines and boundaries which permit the various courts, of whatever power and status, to operate effectively.<sup>156</sup>

## V. CONCLUSION

Article V of the Uniform Probate Code, with or without the amendments proposed in 1970 by the Veterans' Administration, is unquestionably preferable to the 1942 version of the Uniform Veterans' Guardianship Act.<sup>157</sup> If a state entrusts the protection of property of infants and mental incompetents to courts with appro-

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<sup>151</sup> See notes 38-39 *supra* & accompanying text.

<sup>152</sup> See notes 37-38, 134-36, 145 *supra* & accompanying text.

<sup>153</sup> Note 114 *supra*.

<sup>154</sup> Note 104 *supra* & accompanying text.

<sup>155</sup> Note 138 *supra*.

<sup>156</sup> Veterans' Administration Dep't of Veterans' Benefits Information Bull. 27-71-1, August 5, 1971.

<sup>157</sup> Note 5 *supra*.

priate organization and adequate powers, and judges who are competent, honest, fair-minded, and interested in this phase of their work, Article V, without the proposed amendments, should be adequate to enable the Veterans' Administration to perform its difficult mission of supervising thousands of indigent guardians of indigent recipients of its benefits.<sup>158</sup> If the courts entrusted with this protection lack such organization, powers, or judges, the pleas of the Veterans' Administration Chief Attorney for the amendments he has been directed to "actively advocate"<sup>159</sup> should be heard with respect and sympathy. In any event, the Uniform Veterans' Guardianship Act should be repealed in every state which now suffers from its overkill.<sup>160</sup>

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<sup>158</sup> See notes 97-106 *supra* & accompanying text.

<sup>159</sup> Note 112 *supra* & accompanying text.

<sup>160</sup> On July 1, 1972, the Uniform Veterans' Guardianship Act was repealed in Idaho and replaced with Article V of the Uniform Probate Code, without the amendments proposed by the Veterans' Administration but with an additional section recognizing certificates issued by the Veterans' Administration as *prima facie* evidence of the necessity for appointment of a guardian or conservator when they recite the age of a minor or a Veterans' Administration rating of incompetence and that the appointment is a condition precedent to payment of money. IDAHO CODE ANN. §§ 15-5-101 to -501 (Supp. 1971). The additional section (§ 15-5-105) is based on sections 6 and 7 of the U.V.G.A. (1942 version).